IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CHARLES F. GREEN and JANE C. GREEN,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 5202-VCP
JOEL E. TEMPLIN and HOLLY S. TEMPLIN,	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: March 22, 2010
Decided: July 2, 2010

Richard L. Abbott, Esquire, ABBOTT LAW FIRM, Hockessin, Delaware; *Attorneys for Plaintiffs*

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PARSONS, Vice Chancellor.

This case involves a dispute over whether a developer can use a 20 foot wide easement as the primary access to a 49 unit townhouse complex. In 2004, Defendants, Joel E. Templin and Holly S. Templin (the "Templins"), purchased a 12 acre parcel of land adjacent to the residence of Plaintiffs, Charles F. Green and Jane C. Green (the "Greens"). The Templins bought this land with the intention of developing it as a multi-unit townhouse complex. For over thirty years, the only access to the Templins' land was over a 10 foot wide driveway that lay partially within a 20 foot wide easement across the Greens' property. In developing their plan for the townhouse complex, the Templins decided to use the 20 foot wide easement as the primary access to the complex. After the Greens, whose backyard pool and patio are approximately 80 feet from the easement, received notice in 2007 of the plan to expand the use of the easement, they complained to the Templins, imploring them to relocate the main access to the townhouse complex. On January 13, 2010, the day after the Templins' development plan received final approval, the Greens brought this action. The Templins promptly answered the Greens' Complaint and asserted several counterclaims.

The parties then filed cross motions for summary judgment. In their motion, the Greens seek a declaratory judgment and a permanent injunction barring the Templins from using the easement as the primary access to the townhouse complex. The Templins' summary judgment motion seeks a declaratory judgment that their proposed use of the easement is permissible and that they have acquired title to the portion of the driveway that lies outside the boundaries of the easement through adverse possession.

In this Opinion, I deny the Greens' motion for summary judgment in full and grant in part and deny in part the Templins' motion. Specifically, I find that the Templins' proposed use of the easement as the primary access to the townhouse complex is a permissible use of the easement and, thus, deny the Greens' claims for a declaratory judgment and a permanent injunction and grant the Templins' counterclaim for a declaratory judgment to that effect. I also find that the Templins have not shown continuous adverse use of the driveway for the twenty-year prescriptive period and, thus, have not demonstrated either adverse possession of or the existence of a prescriptive easement over the portion of the driveway that lies outside the easement. Accordingly, I deny that aspect of the Templins' motion for summary judgment.

I. BACKGROUND

A. The Parties

Plaintiffs, the Greens, are Delaware residents currently living at 201 Owensby Drive in New Castle County, Delaware.[1]

Defendants, the Templins, are residents of the Commonwealth of Pennsylvania and owners of a 12 acre parcel of land in Bethel Township, Pennsylvania that is adjacent to the Greens' residence (the "PA Lands").[2]

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[1] Compl. ¶ 1; App. to Pls.' Answering Br. ("PAB App.") Ex. 1. Similar abbreviations, *i.e.*, POB, PRB, DOB, DAB, and DRB, are used for the parties' respective opening, answering, and reply briefs and accompanying appendices.

[2] Compl. ¶ 2; DOB App. Ex. 15.

B. Facts

1. The Owensby Land, the Greens' Property, and the Easement

Dating back to 1941, Fulton J. and Evelyn D. Owensby (the "Owensbys") owned a 24.7 acre tract of land that straddled the border between Bethel Township, Pennsylvania and New Castle County, Delaware.[3] In 1974, the Owensbys recorded a record plan for the 10 acres of their land that lay in Delaware (the "DE Lands") with the Recorder of Deeds in and for New Castle County at Microfilm No. 2710 (the "1974 Plan"). The 1974 Plan divided the DE Lands into 10 lots.[4] In the 1974 Plan, the Owensbys reserved a 20 foot wide easement across the far northwesterly portion of what was depicted on the Plan as Lot 1 (the "Easement"). The Easement is depicted on the 1974 Plan with dashed lines and the words "Easement – 20'." The Easement is 102.38 feet long and connects the PA Lands, on which the Owensbys' house (the "Owensby House") was located, with Owensby Drive, which provided the Owensbys with access, via State Line Road, to a major highway.[5] The Easement is the only access to the PA Lands depicted on the 1974

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[3] DOB App. Ex. 1.

[4] DOB App. Ex. 3.

[5] DOB App. Ex. 5. Language in a deed in the chain of title to the PA Lands dating back to 1814 provides "use . . . of a road (1 perch wide) leading . . . in a straight line . . . into the Wilmington Road." DOB App. Ex. 19. A perch is an Old English measurement equaling 16.5 feet. POB App. Ex. 20. State Line Road is 16.5 feet wide and connects with Concord Pike, formerly known as Old Wilmington Road. POB App. Ex. 15; DOB App. Ex. 5. Despite these facts, a dispute exists as to the location of the "One Perch Road," but this dispute is not material for purposes of the pending motions.

Plan.[6] At least half of a 10 foot wide driveway across Lot 1 that leads directly to the Owensby House lies within the boundaries of the Easement.[7] This driveway has existed since at least 1945.[8]

The Owensbys had created plans to subdivide the DE Lands twice previously, in 1959 and 1965 (the "1959 Plan" and the "1965 Plan"), but did not record either of these Plans.[9] Both the 1959 and 1965 Plans allowed 50 feet in width for roads created by those Plans, including Owensby Drive.[10] The 1965 Plan, but not the 1959 Plan, depicted a 50 foot wide connector road leading to the PA Lands through what ultimately would be depicted on the 1974 Plan as Lot 3 ("Lot 3").[11] Neither the 1959 Plan nor the 1974 Plan, however, included a connector road through Lot 3.[12]

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6 DOB App. Ex. 6 at 17.

7 DOB App. Ex. 9. Even though the Greens knew the driveway was not entirely within the Easement, they never objected to the Owensbys' use of the driveway or asked the Owensbys to move the driveway into the Easement. DOB App. Ex. 6 at 19, Ex. 7 at 16. Much of the portion of the Easement that does not contain the driveway is covered by "large old growth trees." *Id.*; POB App. Ex. 6; POB 4.

8 DOB App. Ex. 10.

9 *Stackhouse v. Owensby*, 1976 WL 8270, at *1 (Del. Ch. Mar. 18, 1976).

10 POB App. Ex. 13, Ex. 14.

11 POB App. Ex. 14.

12 POB App. Ex. 13, Ex. 16.

The Greens purchased Lot 1, as depicted on the 1974 Plan (the "Greens' Property"), from the Owensbys on February 24, 1977.[13] The deed to the Greens' Property describes it as Lot 1 on Microfilm No. 2710 in the Office of the Recorder of Deeds in and for New Castle County, Delaware and notes that the Property is "SUBJECT to all existing covenants, easements, restrictions, reservations and agreements of record."[14] Both Charles and Jane Green knew of the Easement when they purchased the Property, though Jane believed it referred to only the driveway.[15] Indeed, the only use of the Easement that has been made during the thirty-three years the Greens have owned their Property is as a driveway providing ingress and egress to the PA Lands.[16] When the Greens purchased their Property and at all times since then, the PA Lands were zoned R-4 for high-density residential use by Bethel Township.[17]

The Greens built their house so that it would not face a 2.3 acre industrial property directly across the street from the Easement.[18] As a result, the house is on the opposite side of the Greens' Property from the Easement. Directly behind the Greens' house and between the house and the Easement is a pool and patio area that is enclosed within a

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13 POB App. Ex. 1 ¶ 8. For more background on the Greens' purchase of their Property, *see Stackhouse*, 1976 WL 8270.

14 DOB App. Ex. 8.

15 DOB App. Ex. 6 at 14, Ex. 7 at 13; POB App. Ex. 1 ¶ 10.

16 POB App. Ex. 1 ¶ 23.

17 DOB App. Ex. 26, Ex. 27.

18 DOB Ex. 6 at 7-8, Ex. 11.

fence five or six feet tall.[19] The Templins submit that the distance between the Greens' house and the Easement is approximately 120 feet, while the Greens assert that the driveway lies roughly 80 feet from their backyard pool and patio.[20]

2. Independence Dogs purchases the PA Lands

On February 19, 1986, the Owensbys conveyed the PA Lands to Independence Dogs, Inc. ("Independence Dogs"), which used the property to operate a commercial dog training facility. On September 17, 1998, Independence Dogs received final approval of a Land Development Plan for the PA Lands from the Delaware County Planning Commission (the "Independence Dogs Plan").[21] The Independence Dogs Plan utilizes the Easement as the primary entrance to the PA Lands.[22] In addition, the Plan also contains an entrance to the PA Lands through an easement across Lot 3, but a note beside this easement states: "40' wide access easement to be available for emergency vehicles."[23] The Greens did not object to the Independence Dogs Plan or its

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19 DOB App. Ex. 11.

20 DOB App. Ex. 16 ¶ 6.

21 DOB App. Ex. 12. The Independence Dogs Plan called for an expansion of the existing commercial kennel and the construction of an 8,000 square foot building that would contain twelve apartment units. *Id.*; DOB 6.

22 DOB App. Ex. 12.

23 DOB App. Ex. 13. *See also* DOB App. Ex. 14 (Minutes from meeting of Bethel Township Board of Supervisors stating that the access road across Lot 3 "was for emergency use only.").

Independence Dogs did not acquire ownership of Lot 3 until August 26, 1999. Docket Item ("D.I.") 48.

implementation, but did reject a proposal to expand the Easement's width to 25 or 27 feet, instead insisting that the primary access to the PA Lands be limited to the 20 foot wide Easement.[24] The Independence Dogs Plan was never implemented, however, and Independence Dogs ceased operations on the PA Lands in 2001.[25]

3. The Templins acquire the PA Lands and seek approval of the Independence Towns Project

On December 1, 2004, the Templins purchased the PA Lands from Independence Dogs.[26] In 2005, the Templins acquired Lot 3 from Independence Dogs[27] and also began leasing the Owensby House to residential tenants. Between the time Independence Dogs ceased its operations on the PA Lands in 2001 and 2005, little, if any, use was made of the driveway across the Greens' Property.[28]

In 2007, the Templins began the process of obtaining approval from Bethel Township to construct a townhouse community on the PA Lands (the "Independence Towns Project").[29] Originally, the Project contemplated 56 units, but the Templins later reduced that number to 49.[30] Bethel Township preliminarily approved the Templins'

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24 DOB App. Ex. 6 at 19, Ex. 7 at 18.

25 POB App. Ex. 1 ¶ 19.

26 DOB App. Ex. 15.

27 POB App. Ex. 21.

28 POB App. Ex. 1 ¶¶ 21-22.

29 DOB App. Ex. 16.

30 *Id.* ¶ 8.

plan for the Independence Towns Project (the "Approved Plan") in April 2009[31] and granted final approval of it on January 12, 2010.[32] The Approved Plan utilizes the Easement as its primary access point and also provides for emergency access across Lot 3.[33] Implementation of the Approved Plan would produce traffic in the amount of 370 trips per day over the Easement.[34]

The Templins originally planned to provide primary access to the Independence Towns Project through Lot 3 and use the Easement only as a one-way secondary point of ingress (the "Alternate Plan").[35] Ultimately, however, the Templins decided not to pursue this plan because they understood that to build a road through Lot 3, they would need to submit a Major Land Development Plan to New Castle County.[36] Specifically, the Templins abandoned the Alternate Plan because they estimated it would take one to two years to obtain approval of a Major Land Development Plan and expected community resistance to the use of Lot 3 as the primary access to the Project.[37] Under the Alternate Plan, all cars entering the Project would drive past the front of the Greens'

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31 Tr. 87.

32 DOB App. Ex. 24. DOB App. Ex. 25 depicts the Approved Plan.

33 DOB App. Ex. 25.

34 POB App. Ex. 48 at 2.

35 The Templins considered the Alternate Plan until at least July 2007. POB App. Ex. 28.

36 DOB App. Ex. 16 ¶ 9, Ex. 28.

37 *Id.* ¶ 9.

house on Owensby Drive before turning onto East Fulton Road and then the Lot 3 access road.[38] The distance between Owensby Drive and the front of the Greens' house is approximately 60 feet.[39] Implementation of the Alternate Plan also would have required townhouses to be built 80 feet closer to the Greens' house than under the Approved Plan.[40]

4. The Greens retain counsel to challenge the Templins' proposed use of the Easement

In June 2007, after receiving notice of the proposal for the Independence Towns Project, the Greens retained counsel "to protect [their] property and prevent overuse of the Driveway Easement."[41] From this time until the Templins received final approval for the Independence Towns Project, the Greens objected to the proposed use of the Easement at numerous Bethel Township meetings.[42] On October 29, 2007, the Greens' counsel informed the Templins by letter of the Greens' objection to the proposed use of the Easement.[43] By letter dated November 16, 2007, counsel for the Greens advised the Templins' counsel of the Greens' view that the proposed use of the Easement would

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38 DOB App. Ex. 28. Both Owensby Drive and East Fulton Road appear to be roughly 20 feet in width. DOB App. Ex. 25.

39 DOB App. Ex. 16 ¶ 6.

40 *Compare* DOB App. Exs. 25 and 28.

41 POB App. Ex. 1 ¶ 24.

42 POB App. Ex. 1 ¶ 27.

43 POB App. Ex. 31. The Greens' counsel forwarded this letter to Bethel Township on November 9, 2007. POB App. Ex. 32.

overburden the Easement in a legally impermissible manner.[44] After neither the Templins nor their counsel responded to these letters, the Greens' counsel wrote to the Templins' counsel again on October 14, 2008. This letter stated that the Greens "intend to pursue all available legal avenues of relief if Mr. Templin should ultimately obtain final approval of his Plan" and noted that the Templins were proceeding with their development plans at their own peril.[45]

At this point, the parties' recitations of the facts begin to diverge somewhat. While the Templins assert that they offered to construct a landscaped berm to help shield the Greens' Property from the Easement,[46] the Greens deny that the Templins communicated with them after they sent the initial letter voicing their objection to the proposed use of the Easement in October 2007.[47]

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44 POB App. Ex. 33.

45 POB App. Ex. 34.

46 DOB App. Ex. 16 ¶ 4. According to Joel Templin's affidavit, the Templins "made several offers to the Greens in an attempt to appease the Greens' concerns relating to the access to the Independence Towns Property through the easement on the Green's property, including but not limited to, offering (1) money and/or berms upwards of 4-feet high in exchange for widening the easement and (2) money in exchange for relocating the easement to save the trees and assist the engineer."). *Id.*

47 POB 12-13. This apparent factual despite is immaterial to the pending cross motions for summary judgment. Therefore, I need not attempt to resolve it here.

C. Procedural History

The Greens filed their Complaint in this action on January 13, 2010.[48] In the Complaint, the Greens seek: (1) a declaratory judgment quieting title over the portion of the Easement which does not contain the driveway and declaring that the Easement cannot be used to access the Independence Towns Project; and (2) a preliminary and permanent injunction barring the Templins from using the Easement to access the Independence Towns Project.

On January 21, 2010, the Court held a scheduling conference at which the parties agreed to proceed with the case on an expedited basis. The Templins filed their Answer and Counterclaims on January 26. They assert eight counterclaims against the Greens for: (1) a declaratory judgment that the Easement can be used for any purpose; (2) adverse possession of the portion of the driveway that lies outside the boundaries of the Easement; (3) imposition of an easement by implication for use of the Easement to access the Independence Towns Project; (4) removal of a fence on the Greens' Property that allegedly encroaches onto the PA Lands; (5) tortious interference with the Templins' contract with a homebuilder; and tortious interference with privileged relations between the Templins and (6) Bethel Township, (7) the Delaware Department of Transportation, and (8) New Castle County. The Greens answered the Templins' Counterclaims on February 4, 2010.

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[48] The Greens signed verifications for their Complaint over seven months earlier on May 28, 2009. DAB App. Ex. 4, Ex. 5.

On February 19, the Greens moved to stay this action pending the decision of the New Castle County Department of Land Use as to whether either or both of the Easement and Lot 3 can be used to access the Independence Towns Project. On February 23, following oral argument, I denied the Greens' motion to stay, but also declined to expedite the proceedings as to the Templins' counterclaims that did not relate directly to the Greens' claims, such as those for tortious interference.

On March 3, 2010, the parties filed cross motions for summary judgment. Both the Greens and the Templins moved for summary judgment on all of the Greens' claims, while the Templins also sought summary judgment on their counterclaims for declaratory judgment and adverse possession. The parties fully briefed both motions. Then, on March 22, I conducted a site visit to the land in dispute and heard oral argument on the parties' respective cross motions for summary judgment.

D. Parties' Contentions

The Greens contend that the Templins' proposed use of the Easement as the primary access to the Independence Towns Project would overburden the Easement, thus entitling them to a declaratory judgment quieting title to the Easement and barring its use to access the Independence Towns Project. The Greens also contend that the Easement should be deemed extinguished by abandonment or termination of purpose or, alternatively, that the use of the Easement should be limited to a small number of motor vehicle trips per day under the doctrine of acquiescence. The Greens further urge the Court to grant a permanent injunction barring the Templins' proposed use of the Easement.

The Templins contend that the Greens' claims are barred under the doctrine of laches. Additionally, they argue that the unrestricted nature of the Easement and the reasonableness of the Easement's proposed use mandate that the Court enter a declaratory judgment that the Easement can be used for any purpose, or at least as the primary access to the Independence Towns Project. Finally, the Templins contend that they have met all requirements necessary to acquire title to the portion of the driveway that lies outside the Easement through adverse possession.

II. ANALYSIS

A. Legal Standard for Cross Motions for Summary Judgment

Under Court of Chancery Rule 56, summary judgment will be granted where the record shows that (1) there is no genuine issue as to any material fact and (2) the moving party is entitled to judgment as a matter of law.[49] In determining whether this burden is met, the court views the facts in the light most favorable to the nonmoving party.[50] In cases where, as here, the parties file cross motions for summary judgment and agree that there is not "any issue of fact material to the disposition of either motion," the court "shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[51] Even though the Greens and the

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49 *Viking Pump, Inc. v. Century Indem. Co.*, 2009 WL 3297559, at *6 (Del. Ch. Oct. 14, 2009).

50 *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).

51 *Zurich Am. Ins. Co. v. St. Paul Surplus Lines, Inc.*, 2009 WL 4895120, at *4 (Del. Ch. Dec. 10, 2009) (quoting Ct. Ch. R. 56(h)).

Templins dispute a few issues of fact, they have agreed that the Court, in effect, should render a final decision on the merits of their claims and that none of the factual disputes need to be resolved to render such a decision. Thus, I will treat the parties' cross motions for summary judgment as a stipulation for decision on the merits based on the record they have submitted.[52]

B. Laches

Among other things, the Templins seek dismissal of the Greens' claims under the doctrine of laches. Laches is an equitable defense that stems from the maxim "equity aids the vigilant, not those who slumber on their rights."[53] A party seeking to invoke laches generally must prove that the claimant (1) knew of his claim, (2) unreasonably delayed in bringing his claim, and (3) injured or prejudiced the other party by his unreasonable delay.[54]

The parties agree that the Greens learned about the Templins' proposed use of the Easement for primary access to the Independence Towns Project sometime in 2007. The

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[52] The disputed issues of fact include whether the Delaware Department of Transportation regulations apply to the Templins' proposed access road over the Easement and where the "One Perch Road" is located. Because none of the disputed issues are material to my decision on the parties' cross motions for summary judgment, I accede to the parties' wishes that I rule on the merits on their claims.

[53] *Reid v. Spazio*, 970 A.2d 176, 182 (Del. 2009) (citing 2 POMEROY'S EQUITY JURISPRUDENCE §§ 418-19 (5th ed. 1941); *accord Adams v. Jankouskas*, 452 A.2d 148, 157 (Del. 1982).

[54] *Whittington v. Dragon Gp. L.L.C.*, 2010 WL 692584, at *5 (Del. Ch. Feb. 15, 2010), *aff'd*, 2010 WL 2484264 (Del. Jun 21, 2010) (citing *Reid*, 970 A.2d at 182-83; *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 210 (Del. 2005)).

parties dispute, however, when the Greens' claims to enjoin the proposed use of the Easement and for a declaration that this use is impermissible became ripe. Relying on the *Calagione* case,[55] the Greens contend that their claims did not ripen until the Approved Plan received final approval from Bethel Township on January 12, 2010. In *Calagione*, the court dismissed as unripe a claim to enjoin implementation of two subdivision plans. Those plans had been approved by the City, but the owners of the lands to be subdivided had not yet proposed construction of anything on those lands. The court, therefore, found the plaintiffs' claim that they would be harmed by implementation of the subdivision plans to be speculative. The court also noted that, if the landowners ever decided to build anything on the lands, they would be subject to an administrative process that would allow the plaintiffs to challenge the proposed construction.[56] According to the Greens, *Calagione* demonstrates that a claim challenging the implementation of a subdivision plan such as the Approved Plan does not become ripe until the plan receives final approval and construction is imminent.

The Templins, on the other hand, contend that the Greens could have filed their Complaint in 2007 or 2008 when they first became aware of the Templins' plan to use the Easement as the primary access to the Independence Towns Project. The Templins rely

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55 *Calagione v. City of Lewes Planning Comm'n*, 2007 WL 4054668 (Del. Ch. Nov. 13, 2007).

56 *Id.* at *1-3.

on the *Heathergreen Commons* case to support this contention.[57] In *Heathergreen Commons*, the court held that the defendants' declaratory judgment claim seeking to determine the extent of restrictions on a parcel of land they owned was ripe even though the defendants had yet to obtain the approvals necessary to build on the land.[58] Critical to the court's decision was how the controversy between the parties was defined. The plaintiffs framed the issue as whether the defendants could build a motel-restaurant on their land. The court, however, concluded that the parties' real dispute actually involved whether the defendants owned the land "free and clear of the restrictions and negative easements under which the plaintiffs claim[ed] enforceable rights."[59] Having so framed the dispute, the court held that the defendants' claim was ripe for adjudication because they had a legitimate need to determine their rights in their property in the face of a bona fide legal challenge to these rights.[60] Although the Templins claim that *Heathergreen Commons* shows that the Greens' claims became ripe before final approval of the Approved Plan, I consider that debatable. What the case demonstrates more clearly is that the Templins could have brought a justiciable declaratory judgment claim as early as 2008, well before final approval was obtained, when they became aware of the Greens' position.

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57 *Heathergreen Commons Condo. Ass'n v. Paul*, 203 A.2d 636 (Del. Ch. Dec. 4, 1985).

58 *Id.* at 639.

59 *Id.* at 640.

60 *Id.* at 640-41.

Consistent with the Greens' argument, the procedural posture of this case more closely resembles *Calagione* than *Heathergreen Commons*. *Calagione* addressed when a claim to enjoin implementation of a subdivision plan becomes ripe. In *Heathergreen Commons*, the issue was the ripeness of a declaratory judgment claim brought by a group of landowners seeking a determination of what they lawfully could do with their land. Accordingly, *Calagione* is more relevant to when the Greens' claims in this action ripened, while *Heathergreen Commons* pertains more to the ripeness of a claim by landowners such as the Templins for a determination of their rights. Thus, the Greens have at least a colorable argument that their claims were not ripe until the Templins' plan received final approval from Bethel Township on January 12, 2010.

In any event, I need not decide the exact date when the Greens' claims ripened because, even if their claims became ripe at the earliest time alleged by the Templins, June 2007, the Greens did not delay unreasonably in bringing them. The Templins essentially argue that because the Greens knew of the proposed use of the Easement in mid-2007 or 2008, they delayed unreasonably by waiting until January 13, 2010 to file suit. The Templins, however, do not explain why waiting until this date, one day after Bethel Township gave the Independence Towns Project final approval, was unreasonable. To the contrary, it is understandable that the Greens would want to make certain the Easement would be expanded before they expended resources seeking a judicial resolution of their opposition to its use. Any number of events could have derailed the Templins' proposed use of the Easement. The Greens consistently and repeatedly objected to the Easement's proposed use and threatened litigation if the Plan received

final approval. Thus, the Greens reasonably could have hoped that the Templins would decide to relocate the primary entrance to the Independence Towns Project to Lot 3, as they originally had proposed, or even abandon the Project entirely.[61] The Greens also pressed their objections before Bethel Township throughout the approval process, so it was possible that the Township might not approve the Templins' Plan. Had any of these events occurred, the Greens would have been spared the necessity of incurring the expense and disruption of litigation to achieve their objective. The Greens, therefore, reasonably decided to defer filing suit until they were more certain the Easement would be used as the primary access to the Independence Towns Project, especially since there is no question the Greens promptly notified the Templins of their vigorous opposition to the proposed use of the Easement. In an October 14, 2008 letter, for example, the Greens' counsel informed the Templins that the Greens "intend to pursue all available legal avenues of relief if Mr. Templin should ultimately obtain final approval of his Plan . . . ."[62] That letter also warns that the Templins "proceed[] with [their] proposed development project at [their] own peril."[63]

By October 2008, therefore, the Templins knew of the Greens' threat to bring suit if the Plan ever received final approval. From at least that point on, the Templins had a

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61 The Greens had observed such a scenario before, as the Independence Dogs Plan received final approval, but was never implemented.

62 POB App. Ex. 34.

63 *Id.*

sufficiently concrete dispute with the Greens over the scope of the Easement in relation to the proposed Independence Towns Project that they could have filed their own action for a declaratory judgment to vindicate their position.[64] They reasonably could infer from the October 14, 2008 letter that the Greens probably would not sue until after the proposed Plan obtained final approval. Nevertheless, the Templins opted not to file suit themselves because they were confident in the opinions of their title company and legal counsel that the proposed use of the Easement was permissible. Presumably, they, too, wished to avoid the potentially unnecessary expense of litigation, just as the Greens did. By proceeding ahead with their Plan and not seeking a declaratory judgment, however, the Templins incurred more risk than the Greens.

Indeed, any injury or prejudice the Templins suffered as a result of the Greens not filing suit until January 13, 2010 was largely self-inflicted. The Templins claim to have suffered a number of injuries as a result of the Greens' lethargy, including: (1) the expenditure of $144,089 in engineering fees from November 2008 to January 2010; (2) a $25,000 penalty under a forbearance agreement with the bank who loaned them the money to purchase the PA Lands; and (3) a risk that the homebuilder will void the contract to purchase the PA Lands, which would have closed immediately after final approval was obtained in January 2010, but for this litigation. Most of these "injuries" could have been avoided, however, had the Templins filed a declaratory judgment suit in 2008 or 2009, after the Greens indicated their intention to sue them if the Independence

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64 *Heathergreen Commons*, 203 A.2d at 639-42.

Towns Project obtained final approval. Therefore, I find that the Templins' alleged injuries are too tenuous to support a finding of laches.

Because the Greens did not unreasonably delay in bringing their claims and did not injure or prejudice the Templins by waiting until January 13, 2010 to file suit, I find that the Greens' claims for a declaratory judgment and permanent injunction are not barred by laches.

C. The Templins' Right to Use the Easement as the Primary Access to the Independence Towns Project

Both parties assert claims relating to the Easement. The Templins seek a declaratory judgment that they can use the Easement as the primary access to the Independence Towns Project, while the Greens seek a declaration quieting title to the Easement and declaring that it cannot be used for that purpose, as well as a permanent injunction barring the Templins' proposed use of the Easement.

A declaratory judgment is a mechanism designed to afford relief from uncertainty regarding rights.[65] Delaware courts routinely grant declaratory relief in actions involving easements.[66] To merit a permanent injunction, a plaintiff must demonstrate: (1) actual

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65 *Beckrich Hldgs., LLC v. Bishop*, 2005 WL 1413305, at *8 (Del. Ch. June 9, 2005) (citing 10 *Del. C.* § 6512).

66 *See Ayers v. Pave It, LLC*, 2006 WL 2052377, at *1 (Del. Ch. July 11, 2006); *Alpha Builders, Inc. v. Sullivan*, 2004 WL 2694917, at *2 (Del. Ch. Nov. 5, 2004); *Larsen v. Lobiondo*, 1994 WL 30538, at *1 (Del. Ch. Jan. 13, 1994).

success on the merits; (2) irreparable harm; and (3) that the balance of the equities weighs in favor of issuing the injunction.[67]

The parties' primary dispute over the Easement involves whether it can be used as the primary access to the 49 unit Independence Towns Project, a use which, if allowed, would increase traffic across the Easement from a few trips per day to approximately 370 trips per day. The Templins contend that this use is permissible because the language creating the Easement contains no restrictions on the Easement's scope. The Greens, on the other hand, assert that because the Easement has been used solely as a driveway to the Owensby House for the past thirty years, it cannot now be used for any other purpose. According to the Greens, therefore, the Templins cannot expand the Easement's use to provide access to the Independence Towns Project.

The parties have not cited, and the Court has not found, any Delaware case that squarely deals with the issue presented here, namely, the extent to which an increase in traffic across an easement is permissible. In an analogous situation, however, the Delaware Supreme Court recently looked to the Restatement (Third) of Property: Servitudes (the "Restatement"), and specifically § 4.9, for guidance in dealing with an issue involving easements comparable to the issue presented in this case.[68] Accordingly,

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67 *Triton Const. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *25 (Del. Ch. May 18, 2009) (citing *Weichert Co. of Pa. v. Young*, 2007 WL 4372823, at *2 (Del. Ch. Dec. 7, 2007)).

68 *Vandeleigh Indus., Inc. v. Storage P'rs of Kirkwood, LLC*, 901 A.2d 91, 100-01 (Del. 2006) (citing RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.09). The issue in *Vandeleigh* was whether the plaintiff could enjoin the defendants'

I look to the relevant section of the Restatement, § 4.10, for guidance in resolving the present dispute. Section 4.10 states:

> Except as limited by the terms of the servitude . . . the holder of an easement . . . is entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the servitude. The manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefited by the servitude. Unless authorized by the terms of the servitude, the holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.[69]

Thus, in order for the Templins' proposed use of the Easement to be permissible, I must find that: (1) the proposed use is reasonably necessary for the convenient enjoyment of the PA Lands; (2) the creation of the Independence Towns Project is a normal development of the PA Lands; and (3) the Templins' expansion of the Easement's use will not cause unreasonable damage to or interfere unreasonably with the enjoyment of the Greens' Property.

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construction of improvements on a portion of their property that was subject to an easement in the plaintiff's favor. Section 4.9 of the Restatement provides that "[e]xcept as limited by the terms of the servitude determined under § 4.1, the holder of the servient estate is entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servitude." Because the plaintiff was not using the easement currently and had no plans to use the easement in the future, the court denied the plaintiff's request for a preliminary injunction, but noted that the defendants would have to remove whatever improvements they made if the plaintiff later developed a viable plan to use the easement. *Id.* at 101-02.

69 RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.10 (2000).

1. Is the Templins' proposed use of the Easement reasonably necessary for the convenient enjoyment of the PA Lands?

In Delaware, whether the use of an easement is reasonably necessary for the convenient enjoyment of the dominant estate is determined according to a four-factor test that considers: (1) the terms of the easement; (2) the purposes for which the easement was created; (3) the nature and situation of the property subject to the easement; and (4) the manner in which the easement has been used.[70]

a. The terms of the Easement

The terms of an easement are often critical in determining its permissible scope, as "the language of the easement is the primary guide for the courts."[71] Here, the terms of the Easement are sparse and of limited help in determining what uses of the Easement are reasonable. If anything, this factor favors the Templins because the Easement contains no express restrictions on its use and there is no reason to doubt that the Owensbys could have placed restrictions on the Easement when they created it if they so desired. Also, the fact that the document that created the Easement, the 1974 Plan, was subject to several years of litigation, but was not amended to place restrictions on the use of the

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[70] *Walton v. Poplos*, 85 A.2d 75, 77 (Del. Ch. 1951) (citing *Williamson v. McMonagle*, 83 A. 139, 139-40 (Del. Ch. 1912)); *see also Vandeleigh*, 901 A.2d at 96-97.

[71] *Regen v. E. Fork Farms, LP*, 2009 WL 3672788, at *2 (Tenn. Ct. App. Nov. 4, 2009).

Easement, provides additional support for the view that the Easement's sparse language was intended to give rise to an unrestricted Easement.[72]

b. The purposes for which the Easement was created

This is the most important of the four factors, as the "paramount rule" of easement construction is that "the intention of the parties is to be given effect if it can be ascertained."[73] The Greens contend that the Easement "was created to formally establish the Owensbys' right to have a driveway from Owensby Drive to the Owensby home."[74] The Templins, on the other hand, aver that the Easement was created for the purpose of providing general access to the 12.3 acre PA Lands when those lands inevitably were subdivided.

To support their contention that the Easement was to be used only as a driveway, and not as an access road to a subdivision, the Greens note that the Owensbys never created a plan to subdivide the PA Lands. The Greens also argue that the Owensbys evidenced their intent not to subdivide these lands by excluding from the 1974 Plan a 50 foot wide road into the PA Lands that was depicted in the 1965 Plan and specifying an Easement only 20 feet in width, rather than the 50 feet they generally left for access roads on lands they proposed to subdivide.[75]

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72 *See Stackhouse v. Owensby*, 1976 WL 8270, at *1 (Del. Ch. Mar. 18, 1976).

73 *Maciey v. Woods*, 154 A.2d 901, 904 (Del. 1959).

74 PRB 9.

75 *See* POB App. Ex. 16.

A number of facts, however, convince me that the Owensbys did not intend the Easement to serve exclusively as a driveway to their House. First, only half of the driveway lies within the boundaries of the Easement, which indicates that the Easement was intended to do more than simply formalize the Owensbys' right to use the driveway. In addition, the driveway predates the creation of the Easement by at least twenty-five years, so if the Owensbys wanted to limit the use of the Easement to driveway purposes, they could have drawn the 1974 Plan so that the Easement coincided with the driveway. In any event, there would be no need for a 20 foot wide easement if its only intended use was as a 10 foot wide driveway.

Moreover, one reasonably would anticipate that a 12 acre parcel of land eventually would be subdivided, and the fact that the Easement constitutes the only access to the PA Lands depicted on the 1974 Plan suggests that the Easement was intended to provide access to the PA lands once they were subdivided. This conclusion is reinforced by the fact that most of the lands surrounding the PA Lands have been developed with medium to high-density residential projects similar to the Independence Towns Project.[76] I also note that the Easement's 20 foot width allows sufficient space for two cars driving in opposite directions to pass each other comfortably, as evidenced by the fact that State Line Road is only approximately 16.5 feet wide.[77] Finally, as previously noted, if the Owensbys had intended the Easement to be used only as a driveway, they easily could

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[76] DOB App. Ex. 29.

[77] DOB App. Ex. 5.

have indicated this intention explicitly when they created the Easement, but did not do so. All of this leads to the conclusion that the Easement was created for the purpose of providing access to the PA Lands, including as they might be subdivided, rather than merely formalizing the Owensbys' right to use the driveway leading to their House. Thus, the purpose factor favors the Templins.

c. The nature and situation of the property subject to the Easement

The Greens' Property contains a single-family detached dwelling with a backyard pool and patio area that is enclosed by a fence five or six feet in height. While the Greens' pool is located closer to the Easement than their house, nothing I saw during the site visit leads me to believe that building a road on the Easement would seriously disrupt the Greens' enjoyment of their pool.[78] The Greens made a conscious effort to locate their house as far away from the side of their Property where the Easement is located as possible, and there is a comfortable distance between the pool and the Easement. Under the Greens' proposed alternative, which would route all Independence Towns Project traffic down Owensby Drive to East Fulton Road and then across Lot 3, cars actually would pass closer to the Greens' house than if the Easement is used as the primary access. I appreciate that the Greens nevertheless would prefer that arrangement, but that does not mean that the Templins' proposed use of the Easement as the primary point of access would interfere unreasonably with the Greens' enjoyment of their Property. Also, landscaping could be added alongside the proposed access road to minimize further the

[78] The pool cannot even be seen from the Easement because of the fence.

road's impact on the Greens' backyard and pool.[79] Considering all of these factors, I find that the situation of the Greens' Property is such that the use of the Easement as the primary access to the Independence Towns Project will not disrupt the Greens' enjoyment of their Property to an unreasonable extent. Accordingly, this factor favors the Templins.

d. The manner in which the Easement has been used

It is undisputed that the Easement has been used almost exclusively as the driveway to the Owensby House for the thirty-three years the Greens have owned their Property. This factor favors the Greens.

e. On balance, the Templins' proposed use of the Easement is reasonably necessary for their convenient enjoyment of the PA Lands

Three of the four factors used to determine the reasonableness of an easement's use, including the most important factor, the purpose for which the easement was created, favor the Templins, while only one factor, the manner in which the easement has been used, favors the Greens. To find that the proposed use of the Easement is unreasonable, I would have to find that the use of the Easement primarily as a driveway for over thirty years outweighs all of the other relevant factors. In the circumstances of this case, that would not be appropriate. The Easement's prior use as a driveway to a single house is not inconsistent with its proposed use as an access road to a 49 unit development. The uses the Owensbys and Independence Dogs made of the PA Lands did not require them

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[79] DOB App. Ex. 16 ¶ 6.

to expand the Easement, but this does not warrant limiting the scope of the Easement to its historic use. I also must consider the facts that: (1) the language of the Easement contains no restrictions on its use; (2) the Easement was created for the purpose of providing access to a medium to high-density subdivision; and (3) the proposed use of the Easement likely will not disrupt significantly the Greens' enjoyment of their Property. In these circumstances, I find that the Templins' proposed use of the Easement as the primary access to the Independence Towns Project is reasonably necessary for their convenient enjoyment of the PA Lands under the four factor test.

2. Is the Independence Towns Project a normal development of the PA Lands?

Section 4.10 of the Restatement also provides that "[t]he manner, frequency, and intensity of the use [of an Easement] may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate . . . ."[80] Because the Greens' primary complaint about the Templins' proposed use of the Easement is that it increases the frequency of the Easement's use from fewer than 5 trips per day to 370, this use will be permissible only if it is designed to accommodate normal development of the PA Lands.

Here, the conversion of the 12.3 acre PA Lands into a 49 unit townhouse complex represents a normal development of those lands. As previously discussed, the Owensbys created the Easement for the purpose of providing access to the PA Lands upon their

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80 RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.10 (2000).

subdivision.[81] This is important because, under the Restatement, "[t]he manner in which the servitude was created may be relevant in determining" whether a proposed development of land constitutes normal development.[82] Moreover, when the Greens acquired their Property, they had at least constructive notice that the PA Lands were likely to be subdivided at some point. When the Greens purchased their Property, the PA Lands already were zoned R-4, a designation that allows for high-density residential use.[83] Moreover, much of the land in the vicinity of the Greens' Property previously was converted into medium and high-density residential developments similar to the Independence Towns Project.[84] As indicated in the Restatement, a change from rural to suburban is normal development.[85] Consequently, the conversion of the PA Lands from one home on a 12.3 acre lot in a relatively suburban setting to a 49 unit suburban townhouse complex clearly represents normal development under the Restatement. Therefore, I conclude that the use of the Easement as the primary access to the Project, which merely increases the frequency of the Easement's use, is acceptable.

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81 *See supra* part II.C.1.b.

82 RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.10 cmt. f (2000).

83 DOB App. Ex. 8, Ex. 26, Ex. 27.

84 DOB App. Ex. 29.

85 RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.10 cmt. f, illus. 14 (2000).

3. Will the Templins' expansion of the Easement's use cause unreasonable damage to or interfere unreasonably with the enjoyment of the Greens' Property?

The Greens submitted no persuasive evidence to indicate that the use of the Easement as the primary access to the Independence Towns Project will cause unreasonable damage to their Property. Comment g to Restatement § 4.10 provides that "the servitude owner is not entitled to cause any greater damage than that contemplated by the parties, or reasonably necessary to accomplish the purposes of the servitude."[86] Here, the Templins plan to do no more than pave over the entirety of the Easement. There is no indication that this process will cause any damage to, or effect in any way, the portion of the Greens' Property that lies outside the Easement. Accordingly, I find that the Templins' proposed use of the Easement will not cause unreasonable damage to the Greens' Property.

Likewise, for the reasons discussed in Part II.C.1.c *supra*, I find that the expansion of the Easement will not interfere unreasonably with the Greens' enjoyment of their Property, based in part on the fact that the Greens' backyard pool is located 80 feet from the Easement, a sufficient distance to prevent traffic across the Easement from interfering with the Greens' enjoyment of their pool and Property. Based on these findings and my conclusions above that the proposed use of the Easement is reasonably necessary for the convenient enjoyment of the PA Lands and the 49 unit Independence Towns Project is a

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[86] *Id.* § 4.10 cmt. g.

normal development of the PA Lands, thus allowing for an increase in the frequency of the Easement's use, I hold that the Templins' proposed use of the Easement as the primary access to the Independence Towns Project is permissible under § 4.10 of the Restatement.

4. The finding that the Templins' proposed use of the Easement is permissible also comports with case law from other jurisdictions

In a matter such as this, where neither party has cited any Delaware case law that is directly on point, it is useful to consider cases from other jurisdictions. Courts in other jurisdictions have found uses of easements similar to the Templins' proposed use to be permissible under Restatement § 4.10.

In *Wolf Creek*, the court found that a mere increase in the volume of traffic over an easement serving a 50 unit condominium development did not overburden the easement such that its use could be enjoined.[87] In making its ruling, the court relied on Restatement § 4.10 and observed that "as a general rule, an increase in traffic over an easement in the process of normal development of the dominant estate, in and of itself, does not overburden a servient estate."[88] The court further noted that evidence tending to support a finding that an easement is being overburdened includes: "(1) decreased

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87 *Weeks v. Wolf Creek Indus., Inc.*, 941 So.2d 263, 267, 273 (Ala. 2006).

88 *Id.* at 272 (citing RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.10 cmt. f (2000)).

property value; (2) increased noise and traffic or interference with the servient owner's peace and enjoyment of the land; and (3) physical damage to the servient estate."[89]

Here, the Greens base their challenge to the proposed use of the Easement on little more than a claim that traffic over the Easement will increase. But, as discussed above, because this increase in traffic comports with what one would expect from the normal development of the PA Lands, the increase alone is not sufficient to prove an unreasonable overburdening of the Easement. Also, while traffic over the Easement will increase, as I previously discussed, the Greens have not shown that the increase will have more than a minimal effect on the Greens' enjoyment of their Property, due to where the Easement is located in relation to the house and fenced-in pool. Likewise, I have found that the Templins' proposed use of the Easement will not damage the Property, and the Greens have produced no evidence that it will decrease the value of their Property.

Similarly, in *Regen*, the court found that the use of an easement to access a 30,000 square foot commercial stable did not unreasonably overburden the easement under Restatement § 4.10.[90] Even though the use of the dominant estate changed from residential to commercial with the building of the stable, the court held that "[a]s a matter of law, an increase in traffic due to the normal development of the dominant estate does not constitute an unreasonable increase in the burden on an easement for ingress and

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89 *Id.*

90 *Regen v. E. Fork Farms, LP*, 2009 WL 3672788, at *3-4 (Tenn. Ct. App. Nov. 4, 2009).

egress."[91] Again, because the Templins' proposed use of the Easement does nothing more than increase the traffic over the Easement due to the normal development of the PA Lands, the proposed use is permissible.[92]

In support of their position, the Greens rely on *Leffingwell Ranch*,[93] but this case provides little help for their argument. In *Leffingwell Ranch*, the court enjoined the proposed use of an easement to access a 174 parcel development because the easement would be overburdened by this use.[94] The court in *Leffingwell Ranch* did not rely on Restatement § 4.10 in reaching its decision, however, nor did it cite the significant increase in traffic over the easement as a basis for enjoining the easement's proposed use. Instead, the court noted that the parties intended the easement to be used only to access certain homesteads and not to be expanded beyond this use.[95] In contrast, the Easement at issue here was created for the purpose of providing access to the PA Lands at a time when the eventual subdivision of those lands was clearly foreseeable as part of their

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91 *Id.*

92 *See also City of Charlotte v. BMJ of Charlotte, LLC*, 675 S.E.2d 59, 71 (N.C. Ct. App. 2009) ("Defendants cite no cases, and we find none, wherein a mere increase in traffic volume over an easement results in misuse or overburdening."); *Downing House Realty v. Hampe*, 497 A.2d 862, 865 (N.H. 1985) ("If the change of a use is a normal development from conditions existing at the time of the grant, such as an increased volume of traffic, the enlargement of a use is not considered to burden unreasonably the servient estate.").

93 *Leffingwell Ranch, Inc. v. Cieri*, 916 P.2d 751 (Mont. 1996).

94 *Id.* at 758.

95 *Id.* at 757.

normal development. The court in *Leffingwell Ranch* also found relevant the facts that the defendant had previously acknowledged the restricted nature of the easement and, thus, was estopped from taking a contrary position, and that the proposed use of the easement impermissibly allowed access to lands not held by the grantees at the time of the grant and, thus, not appurtenant to the easement.[96] No comparable concerns exist in this case. Thus, *Leffingwell Ranch* is distinguishable from the present circumstances and does not support a finding that the Templins' proposed use of the Easement is impermissible.

5. No portion of the Easement was extinguished by abandonment or termination of purpose and the doctrine of acquiescence is inapplicable here

The Greens claim that the portion of the Easement that does not coincide with the driveway has been abandoned. In Delaware, an easement "may be lost by abandonment 'when there is intent to abandon together with manifestation of such intent through acts.'"[97] Accordingly, mere nonuse alone is insufficient to find that an easement has been abandoned; rather, "[t]here must be unequivocal acts affirming the purpose to abandon and thereby give up ownership."[98]

The Greens contend that the Templins and their predecessors manifested an intent to abandon the Easement by allegedly using Lot 3 as the primary access to the PA Lands

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96 *Id.* at 757-58.

97 *Acierno v. Goldstein*, 2005 WL 3111993, at *9 (Del. Ch. Nov. 16, 2005) (citing *Smith v. Smith*, 1990 WL 54919, at *4 (Del. Ch. Apr. 17, 1990)).

98 *Id.*

in both the Independence Dogs Plan and the Alternate Plan. But, their argument is unpersuasive. Contrary to the Greens' assertion, the Independence Dogs Plan does not use Lot 3 as its primary access, but rather limits the use of Lot 3 solely to access for emergency vehicles. The Independence Dogs Plan states, next to the road through Lot 3: "40' wide access easement to be available for emergency vehicles."[99] The minutes of a Bethel Township Board of Supervisors meeting on December 14, 1999 confirm that the road through Lot 3 was to be used for emergency access only. Those minutes reflect the following exchange: "Mr. Brassier stated it was New Castle counties [sic] understanding this road was for emergency use only and was that correct. Mike George stated absolutely, it is one of those things we hope is never used."[100] The Greens downplay this exchange as ambiguous because the minutes do not identify the road and lot being discussed. The minutes go on to state, however, that "Todd Breckridge stated we did not want to put it in, *we did not intend to buy the land*, and it was at the request of Bethel Township that we do this."[101] Independence Dogs purchased Lot 3 on August 26, 1999, three-and-a-half months before the December 14, 1999 Board of Supervisors meeting at which these comments were made. Moreover, Independence Dogs never purchased fee title ownership of any part of the Greens' Property, including the land comprising the

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99 DOB App. Ex. 13.

100 DOB App. Ex. 14.

101 *Id.* (emphasis added).

Easement.[102] Accordingly, the remark about the purchase of land for an emergency access road at the Board of Supervisors meeting must be a reference to Lot 3. The evidence, therefore, belies the Greens' contention that the Independence Dogs Plan provided for primary access to the PA Lands through Lot 3. Instead, that Plan provided for primary access to the PA Lands over the Easement. Thus, I reject the Greens' argument that the drafting of the Independence Dogs Plan evidences an intent to abandon the Easement.

Nor does the drafting of the Alternate Plan, which proposed to utilize Lot 3 as the primary access to the Independence Towns Project, demonstrate any intent to abandon the Easement. To the contrary, it was the Alternate Plan that was abandoned, as the Templins decided before the end of 2007 that the cost of using Lot 3 as the primary access to the Independence Towns Project was too great. Furthermore, the Alternate Plan utilizes the entire Easement as a secondary access to the Independence Towns Project, thereby negating any intent by the Templins to abandon the Easement.[103] Because, the Greens submitted no evidence of any other statements or acts allegedly showing an intent on the part of the Templins or their predecessors to abandon the Easement, I find that they have failed to prove that any portion of the Easement has been abandoned.

The Greens also assert that the Easement has been extinguished by termination of purpose. An easement may be extinguished when the purpose for which it originally was

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102 D.I. 48.

103 POB App. Ex. 27.

created no longer exists and there is no reason for its continued existence.[104] The Greens contend that because Lot 3 can be used to access the Independence Towns Project, the Easement no longer serves its original purpose of providing access to the Owensby House. This contention is without merit. As previously discussed, the Easement was created to allow access to the PA Lands as they then existed and later might reasonably be developed. Not only does this purpose still exist, but the latter part of it is only now coming to fruition, more than thirty years after the Easement's creation. The Templins' intent to use the Easement to access the Independence Towns Project provides ample reason for the Easement's continued existence. Even if the Templins planned to use Lot 3 as the primary access to the Project, as they temporarily did in the Alternate Plan, the Easement still would serve a purpose as a secondary access point. Accordingly, the Easement has not been extinguished by termination of purpose.

Finally, the Greens claim that, through the acquiescence of the Greens and the Templins and their predecessors, the Easement's scope has been fixed so that it can be used only as a driveway. "Under the doctrine of acquiescence, a party may be precluded from asserting a claim where it has knowledge of an improper act by another, yet stands by without objection and allows the other party to act in a manner inconsistent with the claimant's property rights."[105] This doctrine has no application here. The purpose of the

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104 *Edgell v. Divver*, 402 A.2d 395, 397 (Del. Ch. 1979).

105 *Brandywine Dev. Gp., L.L.C. v. Alpha Trust*, 2003 WL 241727, at *4 (Del. Ch. Jan. 30, 2003).

doctrine of acquiescence is to prevent a party who has allowed another party to do something for an extended period of time to come back later and challenge the once permitted action as a violation of his rights.[106] Acquiescence could apply to limit the Templins' use of the Easement only if the Greens had used it in a manner inconsistent with the Templins' rights. But, there is no evidence the Greens ever used the Easement in such a manner. Accordingly, I hold that the doctrine of acquiescence does not apply to this case and does not affect the Templins' rights with respect to the Easement.[107]

6. The Templins are entitled to a declaratory judgment, while the Greens' requests for declaratory relief and a permanent injunction must be denied

Based on my findings that the Templins' proposed use of the Easement as the primary access to the Independence Towns Project is a permissible one and that the Easement has not been lost through abandonment, termination of purpose, or acquiescence, I grant the Templins' motion for a summary declaratory judgment that the Easement can be used as the primary access to the Independence Towns Project and deny

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106 *See Papaioanu v. Comm'rs of Rehoboth*, 186 A.2d 745, 749-50 (Del. Ch. 1962).

107 The Greens again attempt to analogize this situation to the *Leffingwell Ranch* case, in part due to language in that case that says "where the grant or reservation of an easement is general in its terms, [] an exercise of the right, with the acquiescence and consent of both parties, in a particular course or manner, fixes the right and limits it to that particular course or manner." *Leffingwell Ranch, Inc. v. Cieri*, 916 P.2d 751, 757 (Mont. 1996). The Montana Supreme Court did not base the *Leffingwell Ranch* decision on the doctrine of acquiescence, so this language is only dicta. In any event, I previously found *Leffingwell Ranch* distinguishable from this action, *supra* part II.C.4, and, moreover, to the extent *Leffingwell Ranch* did rely on acquiescence, it appears to conflict with Delaware law regarding acquiescence.

the Greens' motion for a declaratory judgment to the contrary. In addition, because the Greens have failed to prove that the Templins' proposed use of the Easement is impermissible, they have not demonstrated actual success on the merits of their claims. As the Greens have failed to prove an essential element of their request for injunctive relief, I also deny their request for a permanent injunction. In light of this ruling, I need not dilate on the other two elements of a claim for permanent injunctive relief, irreparable harm and the balance of the equities, other than to note that the Greens failed to make a strong showing as to either of those elements.[108]

D. The Templins' Claim for a Prescriptive Easement

The Templins also seek summary judgment on their counterclaim for adverse possession of the portion of the driveway that lies outside the boundaries of the Easement. That counterclaim, however, confuses certain fundamental real property concepts and really seeks a prescriptive easement over the disputed portion of the

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[108] As to irreparable harm, because the Templins' proposed use of the Easement is reasonable under the four factor test and does not impinge on the Greens' Property to any great degree, this use will not cause irreparable harm to the Greens. As for the balance of the equities, the Greens' preferred alternative to the use of the Easement as primary access to the Independence Towns Project, which would require cars entering the new development on the PA Lands to drive within 60 feet of the front of their house on Owensby Drive, actually would necessitate cars driving closer to the Greens' house than if they used the Easement. Accordingly, the harm alleged by the Greens is not very substantial. For their part, the Templins have shown that the potential harm to them in terms of additional costs already incurred due to the filing of this proceeding and the potential loss of a buyer if an injunction were granted, even if arguably self-inflicted by their decision not to file a declaratory judgment action at an earlier time, outweigh or, at a minimum, counterbalance the harm claimed by the Greens.

driveway. To succeed in gaining title to property by adverse possession, one must *possess* the subject property in an open, notorious, hostile, and exclusive manner for a continuous twenty-year period.[109] To obtain a prescriptive easement, on the other hand, a claimant and those in privity with him only must *use* the property openly, notoriously, exclusively, and adversely to the rights of others for an uninterrupted period of twenty years.[110] Because the Templins never possessed any portion of the driveway across the Greens' Property and do not even argue that they have,[111] their claim actually is one for a prescriptive easement over the portion of the driveway that lies outside the Easement.

Prescriptive easements are generally disfavored in Delaware.[112] Hence, a claimant has the burden of proving the elements needed to obtain a prescriptive easement by clear and convincing evidence.[113] The Greens contend that, because the driveway was not used between 2001, when Independence Dogs ceased its operations on the PA Lands, and 2005, when the Templins began renting out the Owensby House, the Templins have failed to meet their burden of showing uninterrupted use of the driveway for the past

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109 *Conaway v. Hawkins*, 2010 WL 403313, at *2 (Del. Ch. Feb. 4, 2010).

110 *Dewey Beach Lions Club, Inc. v. Longanecker*, 905 A.2d 128, 134 (Del. Ch. 2006).

111 *See* DOB 26 ("The Templins, and their predecessors in interest, openly and notoriously *used* the portion of the driveway outside of the easement for over 20 years.") (emphasis added).

112 *Dewey Beach Lions Club*, 905 A.2d at 134 (citing *Anolick v. Holy Trinity Greek Orthodox Church*, 787 A.2d 732, 740 (Del. Ch. 2001)).

113 *Dewey Beach Lions Club*, 905 A.2d at 134; *Lickle v. Frank W. Diver, Inc.*, 238 A.2d 326, 329 (Del. 1968).

twenty years. In response, the Templins do little more than argue, incorrectly, that it is the Greens' burden to prove that the Templins and their predecessors have not used the driveway continuously.[114] Having presented no evidence at all that the driveway was used between 2001 and 2005, let alone clear and convincing evidence, the Templins have failed to demonstrate that they, along with their predecessors in interest, used the driveway for an uninterrupted period of twenty years.[115] Thus, the Templins have not demonstrated that they are entitled to either a prescriptive easement over or adverse possession of the portion of the driveway that lies outside the boundaries of the Easement.

III. CONCLUSION

For the foregoing reasons, I find that: (1) the Greens' claims are not barred by the doctrine of laches; (2) the Templins' proposed use of the Easement as the primary access to the Independence Towns Project is permissible; and (3) the Templins have not acquired fee simple title to or a prescriptive easement over the portion of the driveway

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114 DRB 11. *See Dewey Beach Lions Club*, 905 A.2d at 134.

115 Even if I credited the Templins' unsubstantiated assertion that the driveway was used occasionally between 2001 and 2005, this minimal use would not be sufficient to establish open and notorious use of the driveway by clear and convincing evidence. *See Dewey Beach Lions Club*, 905 A.2d at 135 (citing 25 AM. JUR. 2D *Easements and Licenses* § 53 (2004)) ("The use of a prescriptive easement must be so open, visible, and apparent that it gives the owner of the servient tenement knowledge and full opportunity to assert his or her rights."). There also would be disputed issues of fact as to whether the use made of the driveway by the Templins and their predecessors was exclusive and adverse to the rights of the Greens.

that lies outside the boundaries of the Easement. Accordingly, I grant the Templins' motion for a summary judgment declaring that the Easement can be used as the primary access to the Independence Towns Project and deny (1) the Templins' motion as to their counterclaim for adverse possession or an easement by prescription and (2) the Greens' motion for summary judgment on their claims for a declaratory judgment and a permanent injunction barring use of the Easement as the primary access to the Independence Towns Project.

Counsel for the Templins shall submit, on notice to opposing counsel, a proposed form of order implementing the rulings set forth in this Opinion within ten days of the date of the Opinion.